

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES CLEMENTS)	
Decedent)	
VS.)	
)	Docket No. 1,005,612
WALKER CONSTRUCTION)	
Respondent)	
AND)	
)	
TRANSPORTATION INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Through her guardian ad litem, the minor child J. C. appealed the December 30, 2008, Award entered by Administrative Law Judge Rebecca A. Sanders. The Workers Compensation Board heard oral argument on April 7, 2009.

APPEARANCES

Bruce A. Brumley of Topeka, Kansas, appeared for J. C., a minor child of James Clements, as her guardian ad litem.¹ George H. Pearson of Topeka, Kansas, appeared for James Clements' surviving spouse, Mary Clements. James R. Hess of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent). And Matthew R. Bergmann of Topeka, Kansas, appeared for James Clements' son, Anthony James (A. J.) Clements, an alleged incapacitated person, as his guardian ad litem.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, at oral argument before the Board the parties represented that the

¹ Former Administrative Law Judge Bryce D. Benedict appointed the guardians ad litem in this proceeding by Orders dated May 23 and June 21, 2007. Those orders were not appealed.

minor J. C. resides with her mother, Mary Clements, in Americus, Kansas, and that A. J. Clements resides with his mother, Debbie Bryant, in Bay View, Texas. The parties also represent that A. J. Clements is severely incapacitated due to autism.

ISSUES

In the December 30, 2008, Award, Judge Sanders awarded death benefits to James Clements' surviving spouse, Mary Clements, and his two children, J. C. and A. J. Clements. The Judge declined the request by J. C.'s guardian ad litem that any monies paid on behalf of the minor child be paid to a conservator. The Judge, instead, ordered respondent to make payments by a check issued jointly to J. C. and her mother and natural guardian, Mary Clements.

J. C.'s guardian ad litem, Mr. Brumley, contends the Judge erred. Mr. Brumley maintains the Kansas Workers Compensation Act and Probate Code require a conservator be appointed for J. C. Mr. Brumley also argues that perhaps all, or at least some, of the benefits that have previously been paid to Mary Clements as J. C.'s natural guardian should not be credited against respondent's liability to J. C. Finally, Mr. Brumley contends the costs of the conservatorship should be borne by respondent. In summary, Mr. Brumley requests a conservator be appointed for J. C. at respondent's expense and that the Board order respondent to pay to the conservatorship any funds that were inappropriately sent to Mary Clements as J. C.'s natural guardian. Mr. Brumley takes no position whether a conservatorship should also be established for A. J. Clements, who is now more than 18 years old.

Conversely, respondent maintains a conservator is neither mandatory under K.S.A. 44-513a nor necessary as there is no allegation that Mary Clements has misused the funds she received for J. C. Respondent also argues the cost of establishing and maintaining a conservatorship would have to be paid from the funds paid to the children as there is no provision in the Workers Compensation Act to assess that cost against respondent. Finally, respondent maintains that an order from the Board requiring any repayment of benefits previously paid to Mary Clements on J. C.'s behalf or to Debbie Bryant on A. J. Clements' behalf would result in undue litigation and expense for all parties as respondent would pursue reimbursement.

Mary Clements requests the Board to affirm the Award. Mary Clements argues K.S.A. 44-513a gives the Division of Workers Compensation discretion in determining whether a conservatorship should be established and, in this instance, there is not enough compensation involved to justify the expense.

Finally, Mr. Bergmann, on behalf of A. J. Clements, argues that a conservator has not been requested for A. J. Clements and, therefore, that issue is not before the Board on this appeal.

The issues before the Board on this appeal are:

1. Should a conservator be appointed for J. C.?
2. If so, should a conservator also be appointed for A. J. Clements?
3. Who is responsible for paying the costs of establishing and maintaining the conservatorship?
4. If a conservatorship is to be established for either J. C. or A. J. Clements, does respondent receive credit for any or all of the payments respondent has made on their behalf to their mothers as their natural guardians?

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

On August 1, 2000, James Clements was injured in a work-related accident. As a direct result of the injuries sustained in that accident, Mr. Clements died on October 13, 2003. James Clements was survived by his spouse, Mary Clements; a 14-year-old son, Anthony James Clements, who was born April 4, 1989; and a 4-year-old daughter, J. C., who was born May 22, 1999.

Mary Clements and her daughter J. C. presently reside in Americus, Kansas, and Debbie Bryant and her son A. J. Clements presently reside in Bay View, Texas.

The parties represent that upon Mr. Clements' death, respondent began paying compensation under K.S.A. 44-510b to Mary Clements as the decedent's surviving spouse and to both minor children. Conservators were not appointed for the minor children. Consequently, the payments to the children were made to the children's mothers as the natural guardians. Accordingly, Mary Clements received the compensation due J. C. And Debbie Bryant received the compensation due A. J. Clements, who is now 20 years old but is allegedly incapacitated from earning wages in any substantial or gainful employment.

Furthermore, the parties represent that as of December 15, 2008, Mary Clements had received compensation as the surviving spouse in the sum of \$73,934.50, which comprises an initial lump sum payment of \$20,000 plus 269 weeks of compensation at

\$200.50 per week. In addition, as of August 13, 2007, Mary Clements had been paid compensation owed J. C. in the sum of \$30,050, which comprises an initial lump sum payment of \$10,000 plus 200 weeks of compensation at \$100.25 per week. Similarly, as of August 13, 2007, Debbie Bryant had been paid compensation owed A. J. Clements in the sum of \$30,050.

CONCLUSIONS OF LAW

The first issue raised on this appeal is whether the Judge erred by failing to order that a conservator be appointed to receive the compensation due J. C.

The statute controlling death benefits, K.S.A. 44-510b, makes little mention of conservators. The version of the statute at the time of the decedent's accident, K.S.A. 44-510b, makes no mention of conservators. In the version of the statute at the time of the decedent's death, K.S.A. 2003 Supp. 44-510b, conservators are not mentioned until the final subsection of the statute and then the term is only mentioned in the context of who is required to submit an annual statement. That subsection, K.S.A. 2003 Supp. 44-510b(i), provides, in part:

If the person receiving benefits under this section is a surviving spouse or a dependent child who has reached the age of majority, such person shall personally submit an annual statement. If the person receiving benefits under this section is a dependent child subject to a conservator, the conservator of such child shall submit the annual statement. . . .

But that subsection is silent about who should submit the annual statement for a minor child who does not have a conservator.

The Workers Compensation Act, however, provides that a guardian or conservator may act on behalf of a minor or an incapacitated person; moreover, no time limit under the Act shall begin to run until a guardian or conservator has been appointed. K.S.A. 44-509 provides:

In case an injured workman is an incapacitated person or a minor, or when death results from an injury in case any of his dependents, as herein defined, is an incapacitated person "or a minor" at the time when any right, privilege, or election accrues to him under the workmen's compensation act, his guardian or conservator may on his behalf, claim and exercise such right, privilege, or election, and no limitation of time, in the workmen's compensation act provided for, shall run, so long as such incapacitated person or minor has no guardian or conservator.

What is more, the Act authorizes an administrative law judge to direct payments to a minor in accordance with the Kansas Probate Code pertaining to guardians and conservators, K.S.A. 59-3050 through 59-3095. K.S.A. 44-513a reads:

Whenever a minor person shall be entitled to compensation under the provisions of the workers compensation act, the administrative law judge is authorized to direct such compensation to be paid in accordance with K.S.A. 59-3001 *et seq.*, and amendments thereto.

That statute is silent, however, as to incapacitated persons. The version of the statute at the time of the decedent's death, K.S.A. 2003 Supp. 44-513a, contains modified language:

Whenever a minor person shall be entitled to compensation under the provisions of the workers compensation act, the administrative law judge is authorized to direct such compensation to be paid in accordance with K.S.A. 2003 Supp. 59-3050 through 59-3095, and amendments thereto.

The 1998 legislature modified the statute, as follows:

K.S.A. 44-513a is hereby amended to read as follows: 44-513a. ~~(a)~~ Whenever a minor person shall be entitled to compensation under the provisions of the ~~workmen's~~ workers compensation act, ~~in an amount not to exceed two thousand dollars (\$2,000);~~ the ~~director~~ administrative law judge is authorized to direct such compensation to be paid to the natural guardian of such minor person, or to the minor himself, provided that if a conservator shall have been appointed for such minor person the payment shall be directed to such conservator. Before ordering such a payment, the director shall inquire into the advisability thereof, and if he finds that there is no manifest disadvantage to the minor person therefrom, he shall order such payment to be made to the natural guardian, or to the minor himself in accordance with K.S.A. 59-3001 *et seq.*, and amendments thereto.

~~(b) In the event the director is of the opinion that payment of such compensation should not be made to the natural guardian, or to such minor, he shall direct to whom payment shall be made. The payment of compensation pursuant to an order or directive made by the director under authority of the workmen's compensation act shall exclude and satisfy all other claims and causes of action of such minor person for the injury or death for which the compensation award is made.²~~

² 1998 Session Laws of Kansas, Ch. 114, Sec. 2, at 524 (July 1, 1998).

Furthermore, K.A.R. 51-10-6, which has now been revoked, required a guardian or conservator to be appointed whenever the compensation payable to a minor potentially exceeded \$2,000. That regulation read:

Guardian or conservator. (a) In death cases in which there are dependent minors and the amount due a dependent minor does not exceed \$2,000, compensation may be ordered by the administrative law judge to be paid directly to the natural guardian of the minor dependent. If the administrative law judge determines that payment of that compensation shall not be made to the natural guardian, some other person to whom payment shall be made may then be designated by the administrative law judge.

(b) In every case in which a claim is made for compensation by a minor worker and the director is requested to determine the amount of compensation due, the minor worker shall be represented at the hearing by a duly appointed guardian, conservator, natural guardian, or next friend.

(c) In all cases involving dependent minors in which compensation due the minor is potentially in excess of \$2,000, the minor shall have appointed, by a court of appropriate jurisdiction, a guardian or conservator to represent the minor's interests. Payments shall be directed to the guardian or conservator.

If the court that appoints the guardian or conservator requires the appointee to post a surety bond, the cost of that bond shall be paid by the employer. (Authorized by K.S.A. 44-573; implementing K.S.A. 44-509, 44-513a; effective Jan. 1, 1966; amended Jan. 1, 1973; amended Feb. 15, 1977; amended May 1, 1978; amended May 1, 1983; amended May 22, 1998[; revoked June 21, 2002].)

[Note: Statutorily superceded by K.S.A. 1998 Supp. 44-513a.]

Accordingly, before 1998 a conservator would have been required for both of decedent's children. It would appear the 1998 changes to K.S.A. 44-513a were an attempt to conform the Workers Compensation Act to the Kansas Probate Code.

Two statutes from the Probate Code cited by Mr. Brumley are especially relevant to this situation; namely, K.S.A. 59-3053, which pertains to a natural guardian's right and responsibility to hold a minor's estate in trust, and K.S.A. 59-3055(b), which pertains to payments less than \$10,000. K.S.A. 59-3053(a) provides:

A natural guardian shall have the right to the custody of the natural guardian's minor child and the right to exercise control over the person of the natural guardian's minor child as provided by law, unless a guardian has been appointed for the minor. The natural guardian of such minor has the right and responsibility to hold in trust and manage such person's estate for such person's

benefit all of the personal and real property vested in such minor when the total of such property does not exceed \$10,000 in value, unless a guardian or conservator has been appointed for the minor.

And K.S.A. 59-3055(b) reads:

Any court having either control over or possession of any amount of money not exceeding \$10,000, the right to which is vested in a minor, shall have the discretion to order the payment of the money to any person, including the natural guardian of the minor, or the minor. If the person is the conservator for the minor, the court may waive or recommend the waiver of the requirement of a bond. If the person is anyone other than the minor, the court shall order that person to hold in trust and manage such person's estate for such person's benefit.

Clearly, the Workers Compensation Act authorizes the judge to order compensation to be paid to a conservator for the benefit of a minor child. The Board similarly holds the legislature intended to grant the administrative law judges the authority to order payments to be made to a conservator for the benefit of an incapacitated person. What is more, the Kansas Probate Code by implication requires a conservator to be appointed when the amount of money (for example, the amount of compensation) involved exceeds \$10,000.

Upon the death of their father, James Clements, both J. C. and A. J. Clements were entitled to receive a lump sum payment of \$10,000 each, which was immediately due.³ In addition, each child was entitled to begin receiving a weekly compensation payment, which the parties represent equaled \$100.25 per week. As further represented by the parties, by reason of their father's death J. C. and A. J. Clements are each entitled compensation under K.S.A. 44-510b that totals \$30,050 as of August 13, 2007, and each are entitled to receive weekly payments after that date in the sum of \$100.25, until such time as those benefits are discontinued as provided by K.S.A. 44-510b.

The Board finds that at the time of their father's death both J. C. and A. J. Clements had claims that exceeded \$10,000 in compensation and, therefore, it is required that conservators be appointed for both as J. C. has not reached the age of majority and A. J. Clements is allegedly incapacitated.

There is no specific statute in the Workers Compensation Act that addresses who should bear the cost of establishing and maintaining those conservatorships. The Board, however, finds that cost should be borne by respondent as conservators are required before respondent can satisfy its obligation under the Act to pay compensation to the decedent's children. What is more, the conservatorships protect both respondent and the

³ See K.S.A. 44-510b(a).

children. For example, the appointment of conservators ensures the compensation due the children goes to their estate. Conversely, absent a conservator respondent risks losing credit for the payment of compensation due the children.

The December 30, 2008, Award is reversed and remanded to Judge Sanders for further proceedings once conservators have been properly appointed for J. C. and A. J. Clements and counsel for the conservatorships or the conservators have entered their appearances. The remaining issue concerning the amount of credit respondent should receive for prior payments of compensation due J. C. and A. J. Clements is premature as it may be abandoned or resolved upon remand.

WHEREFORE, the December 30, 2008, Award is set aside, reversed and remanded to Judge Sanders for additional proceedings once conservators for J. C. and A. J. Clements or counsel for the conservatorships have entered their appearances. The Board does not retain jurisdiction over this claim.

IT IS SO ORDERED.

Dated this ____ day of May, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Members agree that conservatorships are required but respectfully dissent from the Majority with regard to the order requiring respondent to bear the expenses for establishing and maintaining the conservatorships for both J. C. and A. J. Clements. The Majority accurately noted that the Workers Compensation Act does not address who should bear the cost for establishing and maintaining these conservatorships. As was recently determined by the Kansas Supreme Court in *Casco v. Armour Swift-*

Eckrich, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007), when a statute is construed, the court is required to give effect to the legislative intent if that intent can be ascertained. When a statute is plain and unambiguous, the court must give effect to the legislature's intention as expressed, rather than determine what the law should or should not be. "A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute." (*Casco* at Syl. ¶ 6.) The costs of establishing and maintaining the conservatorships for both J. C. and A. J. Clements are the responsibility of their respective guardians and should be paid for from the funds paid to the children.

BOARD MEMBER

BOARD MEMBER

c: George H. Pearson, Attorney for Mary Clements
Bruce A. Brumley, Guardian Ad Litem for J. C.
Matthew R. Bergmann, Guardian Ad Litem for Anthony James Clements
James R. Hess, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge